IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

ORDINARY ORIGINAL CIVIL JURISDICTION.

WRIT PETITION (L) NO.3439 OF 2004.

Himalaya Parvatiya Co-op. Hsg. Soc. Ltd. .... Petitioner.

V/s

Jagdish Lohani & Others .... Respondents.

Mr.A.S. Desai with Mr.R.S.Ghadge for the petitioner.

Mr.M.P.Vashi for respondent No.1.

Mr.Angad Sayed, AGP for Respondents 2 to 4.

CORAM: F.I. REBELLO, J.

21-12-2004.

PC:

The petitioner a cooperative society has challenged the order dated 14.12.2004 whereby the appeal preferred by the respondent No.1 herein was allowed. The returning officer had rejected the nomination paper of the petitioner on the ground that the proposer was an associate member and consequently the nomination could not be entertained. An appeal has been provided under the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as "the MCS Act"). The respondent No.1 preferred the appeal. That appeal has been allowed.

2. On behalf of the petitioner their learned counsel, firstly contends that

associate member could not have proposed the name of a candidate and for that purpose seeks to rely on section 27(2) of the MCS act as also on by-law No.118. A perusal of section 27(2) would only show the order of preference for voting in the case where there is a member and associate members. In other words, it restricts the number of persons who can exercise their franchise. That situation would arise only when voting stage is reached. The associate member will have the right to vote only if the member does not vote. This would be of no assistance to support the contention advanced on behalf of the petitioner that an associate member cannot propose nor can he contest elections. In so far as by-law No.118 is concerned all that it provides is that if the associate member seeks to contest the election then he must submit a no objection certificate and undertaking as required under the bye-laws. In the instant case the associate member is not contesting elections and consequently by-law No.118 would not be attracted. There is nothing to debar an associate member from proposing a candidate. The first contention must therefore be rejected.

3. It is then contended that in an appeal under section 152A, all candidates whose nominations have been found in order ought to have been joined as parties. As they had not been joined the appeal ought to have been dismissed on the ground of nonjoinder of necessary parties. The point, it is contended was raised before the Appellate Authority. A judgment of the learned Division Bench of this Court was pointed out and yet the same was not considered and decided.

4. On behalf of the respondent their learned counsel contends that out of the 26

members who had filed nominations 16 nominations were rejected out of which 12 had preferred appeals and seven appeals were allowed. It is also submitted that no prejudice whatsoever is occasioned to any person if the candidate is allowed to contest as it is the right of the electors to choose the candidate of their choice. This Court, it is contended should not in exercise its extra ordinary jurisdiction and interfere with the order which otherwise is legal and just. It is also set out that in the petition there is no averment that the petitioner-society has passed any resolution to contest the order of the Appellate Authority.

5. Having heard the learned counsel for the parties it is not necessary to go into the issue as to whether appeal filed was properly constituted as the petitioner-society ought to have averred in the petition that they have passed a resolution. It is no doubt true that on behalf of the Society learned counsel states that a resolution is passed. To my mind that ought to have been pleaded and in the absence of said pleadings or the resolution it will not be possible to entertain the present petition. It may also be borne in mind that none of the candidates whose nominations were accepted have chosen to challenge the order passed by the Appellate Authority nor have those candidates being joined as parties to the present petition. The petitioner-society who is not a candidate cannot really be an aggrieved party, considering that none of the candidates have chosen to challenge the order. Ultimately this is a residential cooperative society. It is for the members to decide amongst them as to who should represent them. It must also be borne in mind that though the judgment of the Division Bench of this Court does hold that an appeal without joining of the contesting candidate is not maintainable, yet at the same

time, it must be remembered that the election process is on and in the very same judgment there is an observation that the point can be urged in an election petition. Considering the above, this would not be a fit case for this Court to exercise its extra ordinary writ jurisdiction. Hence the petition is rejected.